IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-948

ANTHONY TINGHINO,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MATTHIAS A. LYDON
Suite 2120
120 South LaSalle Street
Chicago, Illinois 60603
(312) 236-7809

Counsel for Petitioner

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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The petitioner, Anthony Tinghino, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on November 13, 1978.

OPINION BELOW

The opinion of the Court of Appeals, rendered by unpublished order appears in the appendix hereto. The Court affirmed a judgment of conviction for violations of Title 18, United States Code, Section 371, 1341 and 1952. Petitioner was tried in the United States District Court for the Northern District of Illinois by a jury and there is no opinion of that Court.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on November 13, 1978. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Does a criminal defendant's constitutional rights to due process and a fair trial and to confront witnesses against him mandate a severance of defendants where the co-defendant urges as a defense that he was without criminal intent because he was working as an informer at the direction of the Federal Bureau of Investigation gathering information on misconduct by the defendant, but does not testify?

2. Does the suggestion to the jury in an arson-fraud case by counsel for the co-defendant during cross examination that the defendant was connected to counterfeiting activities deprive the defendant of his right to due process and a fair trial?

3. Is a defendant deprived of due process and a fair trial when the prosecutor and counsel for the co-defendant urge through repeated questions to witnesses and statements to the jury that the defendant engaged in bribery of police arson investigators, and no proof of such allegations is introduced?

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED

Fifth Amendment, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land o. naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rule of Criminal Procedure 14

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Federal Rule of Evidence 401

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rule of Evidence 402

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Federal Rule of Evidence 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 404

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

Nature of Case

The defendant, Anthony Tinghino, and one co-defendant, Barry Tucker, were charged in a fourteen count indictment filed March 2, 1977, in the Northern District of Illinois, with violations of Sections 371, 1341 and 1952, of Title 18, United States Code (Rec. 1).[1] Count One was a conspiracy charge, alleging an illegal combination by the defendants to intentionally cause the destruction by fire of three different businesses in order to collect the fire insurance proceeds. The indictment further specified that the defendants set up the businesses before the fires for the purpose of burning them, and then after the fires caused false documents to be submitted to the insurance companies. Counts Two through Fourteen alleged separate substantive violations committed pursuant to the conspiracy, involving use of the mails and interstate travel.

Counts Nine and Twelve were dismissed by the District Court (Tr. 1006, 1013; Rec. 64). Jury verdicts of guilty were returned on the remaining counts (Rec. 61), Tinghino's post trial motions for a judgment of acquittal or a new trial were denied (Rec. 68), and upon a judgment of conviction entered on the verdicts, Anthony Tinghino was committed to the custody of the Attorney General of the United States for a period of three years on Count One, and was placed on probation on the

[1] Ten volumes of transcripts of trial proceedings, paginated consecutively, have been filed on appeal in the Court below and are referred to herein as "Tr." A supplementary eleventh volume covers only the opening statements of counsel and is cited as "S. Tr." As used herein, "Rec." refers to the Record on Appeal in the Court below.

remaining counts for a period of three years to run consecutively to the sentence imposed on Count One and concurrently with the sentences on the remaining counts (Rec. 67).

Statement of Facts

The indictment related to three separate fires at three different locations on three different dates. The three businesses were American Decorative Industries, Inc., and Fast Trac Snowmobile Center, 2515-17 West Peterson, Chicago, Illinois; Dormel Distributing Company, 2406 West Bryn Mawr, Chicago, Illinois; and Spaces and Places, 1903 West Howard, Chicago, Illinois. On February 19, 1972, a fire destroyed property at 2515-17 West Peterson; on November 7, 1972, the property at 2406 Bryn Mawr burned; on March 18, 1973, the property at 1903 West Howard burned. All were fires which had been intentionally set and this fact was known to all involved.

Common to all three fires was the fact that Anthony Tinghino was the public fire insurance adjuster acting on behalf of insured parties in collecting on claims made against insurance companies. In all three cases money was paid by the insurance companies in settlement of the claims. An amount of $24,800 was paid on the American Decorative claim, $20,000, on Dormel, and $30,000, on Spaces and Places. It was also uncontested by Tinghino that the co-defendant Tucker brought the business of adjusting the three fire losses to him.

Subsequent to the events charged in the indictment, it was learned that the co-defendant Tucker had been a paid, confidential, government informant from 1964 through January, 1976 (Tr. 1277-81, 1306). The Government, of course, maintained that with respect to the

charged offenses, Tucker had been acting on his own, without the blessing of any government agent, and not in his informant status. Prior to trial Tinghino moved for a severance and a separate trial from that of Tucker, anticipating that their defenses would collide because of Tucker's informant status (Rec. 17, 34); the motions were denied (Rec. 36, 45).

Opening statements made the clash between defenses more apparent when counsel for Tucker told the jury that his client was a government informant (S. Tr. 15), said he disagreed with what counsel for Tinghino had said in his opening statement regarding Tinghino's version of the case (S. Tr. 12-13), and proceeded to say that Tinghino was responsible for burning buildings down (S. Tr. 13), submitting false claims to insurance companies (S. Tr. 14), and bribing policemen to submit false reports (S. Tr. 14 and 17). This last accusation had not been alluded to by the prosecutor, nor did the prosecution or anyone else offer any evidence to support it. Tucker's counsel further advanced the theory in his opening remarks that his client became involved in the charged arson activities at the urging of the Federal Bureau of Investigation and found himself indicted because he could not provide sufficient information to charge policemen with Tinghino (S. Tr. 17-18).

Tinghino's opening statement had been brief, acknowledging the arson nature of the fires, the fact that insurance claims had been made and paid, that Tinghino had acted as the public adjuster for the claimants on all three losses, that Tucker was the source of the business for Tinghino. The theory of defense advanced was that Tinghino had handled these fire losses in the usual and customary manner and that those who did something wrong or might have done something wrong were now pointing to him to ameliorate their own situations (S. Tr. 9-12).

In light of the Tucker opening statement, counsel for Tinghino immediately moved for a mistrial and severance (Tr. 9), but the Court denied those motions. The resultant prejudice toward Tinghino only intensified. The first witness of any significance was Harry Widlan. Widlan, an alleged accomplice, was granted immunity (Tr. 10-11). Widlan testified on direct examination that on behalf of Tinghino, Tucker and himself, he had "fronted" as the operator of Spaces and Places, that he, Tinghino and Tucker had planned the March 18, 1973 fire at Spaces and Places beforehand, and that they later submitted false invoices and documents to the insurance company in order to collect $30,000 in insurance proceeds (Tr. 31-83).

Counsel for Tinghino adduced impeaching testimony which included that Widlan was a four times convicted felon, currently incarcerated (Tr. 118-20), who was testifying for the Government under a grant of immunity in expectation that the prosecutor would write a letter to the parole authorities on his behalf (Tr. 100). There was further impeachment with prior inconsistent statements (Tr. 110-16, 121-26, 130-33) and on his inability to recall the manner in which the insurance proceeds were actually distributed (Tr. 137-142, 226-236, 241-42).

After Tinghino's cross examination of Widlan, counsel for Tucker embarked on a cross examination, over Tinghino's objection which suggested that Widlan, who was then incarcerated on a counterfeiting charge, had been engaged in counterfeiting activities with Tinghino. In the course of cross examination, Tucker's counsel made reference to a statement read to the grand jury which was in addition to that concerning the case at hand. The jury was made aware that a statement regarding some other matter, but also regarding one of the

same persons involved in the case at hand, had been made to the grand jury (Tr. 177-78). At that point a sidebar conference was held, resulting in a *voir dire* examination by counsel for Tucker, outside the jury's presence, on the subject of Tinghino, Widlan and counterfeiting activities (Tr. 179-86). Over the objections of the prosecutor and counsel for Tinghino (Tr. 189-92), the court ruled that Tucker could explore the contents of the statement regarding counterfeiting in a general manner not stating the subject matter of the charge (Tr. 195). The jury returned to the courtroom and the following ensued (Tr. 197-98):

"Q. Did you receive this statement in a similar manner as you received the statement from Agent Doyle? In other words, just prior to you going into the grand jury they showed you a statement?

A. I signed one statement at the time of my arrest with the Secret Service, Whether it was that one or not, I don't remember.

Q. Was that in Ohio?

A. Yes.

Q. That is the arrest you are now being sentenced on? You are now serving a sentence?

A. Correct.

Q. To the best of your recollection it is the statement you gave then? That is the statement that you read to the grand jury?

A. I believe so.

Q. In that statement is it not a fact that you told the members of the grand jury of certain criminal conduct that you knew of between some of the participants in this case?

A. Yes

Q. *Was it not Mr. Tinghino that you had accused in that statement of criminal conduct other than the criminal conduct that you have already testified to?*

Mr. Lydon: Objection, your Honor.

The Court: Overruled.

* * *

A. The answer is yes.

By Mr. Durkin: Q. Pardon me?

A. Yes.

Q. Is it not a fact that in that statement and consequently in your testimony to the grand jury that you yourself admitted being involved in that same criminal conduct that you charged Mr. Tinghino with before the grand jury?

Mr. Lydon: I object.

The Court: Overruled.

By The Witness: A. Yes.

Q. That is the same statement you gave when you were arrested, was it not?

The Court: He has already answered that.

Mr. Durkin: All right."[2]

Counsel for Tucker went on to hint at other misconduct by Tinghino with the following series of questions and answers (Tr. 202-03):

"Q. Did Agent Doyle ever have occasion to ask you whether or not you had any knowledge of alleged bribes taking place among members of the Chicago Police Department Bomb and Arson Squad?

A. He might have, yes.

Q. Are you saying he might have or did he?

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[2] The jury's recollection of the counterfeiting inquiry was revived with the following questions about Widlan during Tinghino's cross examination by Tucker (Tr. 1178-79):

"Q. And D & W Enterprises' main product when you first met Harry Widlan was these lights that detected counterfeit money, right?

A. That is right.

Q. Now, was that a big or small business as far as you can determine?

A. I really don't know. I have no opinion on it.

Q. Do you know whether these counterfeit money detectors sold well or not?

A. No, I don't.

Q. *That is not really all that Harry Widlan was involved in through that, was it?*

Mr. Lydon: Your Honor, I will object. May we have a sidebar?"

A. My recollection is a little hazy but it is very possible during the conversation he did, yes.

* * *

Q. To the best of your memory as you sit here today you think he did?
A. I think so, yes.
Q. You weren't able to tell him anything other than what had happened with the polygraph test, right?
A. That's correct.
Q. Because you yourself had never offered any bribes?
A. Correct."

At the conclusion of this cross examination Tinghino renewed his motion for a mistrial and severance. The motions were denied (Tr. 218-20).

The latter part of Tucker's cross examination must be considered in context. The prosecution never elicited any evidence of bribery of police officers at any time in the trial, much less through examination of Widlan. Widlan did testify on direct examination that Tinghino interceded on his behalf when Chicago police officers requested him to take a polygraph examination (Tr. 69-71), but there was no testimony about any improprieties being involved.

The situation became more invidious. During the Government's case in chief, witnesses were repeatedly asked by Tucker's counsel about the subject of bribery of the Chicago Police Department Bomb and Arson Squad even though the subject had not been broached on direct examination (Tr. 369-72- 494-95, 781).

Tinghino then, in his case, put Officer William McInerney of the Chicago Police Department Bomb and Arson Squad on the witness stand in order to contradict and impeach the testimony of Government witnesses Katz and Widlan. As an afterthought, but in partial

response to the earlier suggestions during the Government's case in the presence of the jury, counsel for Tinghino asked whether McInerney was ever paid any money by Tinghino. The response was negative (Tr. 925).

Without countering evidence or any basis in fact apparent anywhere in the record, the following cross examination was conducted by the Government prosecutor (Tr. 949-52):

"Q. And how is it that you came to be introduced to Mr. Tinghino?
A. He was a friend of Mr. Tyndall's.
Q. Okay, he just brought him over to your house?
A. Yes, I had many visitors while I was recuperating.
Q. I see. Well, did you and Mr. Tinghino continue to socialize or get together at all after the fire—or, excuse me, after your injury?
A. I have seen him many times after that.
Q. Well, in what situations, at work?
A. I would see him around fires, occasionally I had lunch with him. I don't socialize with him.
Q. Well, did you ever go out and play golf together?
A. No, we did not.
Q. Fishing?
A. No.
Q. Go the the ball park?
A. No, sir.
Q. So you don't call Mr. Tinghino and ask him to do anything or go out with you or anything?
A. Do I call Mr. Tinghino and ask him to do what, sir?
Q. Well, go out and play golf and do anything, have lunch.
A. I have called him on occasion to have lunch, yes.
Q. And he has called you?
A. Yes, he has.

Q. And for what purposes?
A. To have lunch or something.
Q. And how often have you had lunch with Mr. Tinghino?
A. I don't know. I couldn't recall.
Q. Are your families friends?
A. I have met his wife, I think twice.
Q. Have you ever received anything of any value either directly or indirectly from Mr. Tinghino?
A. No, sir.
Q. Ever bought you lunch?
A. He probably has. I bought him lunches, too. I don't recall when it was.
Q. Did you ever receive money from your partner, John O'Connell?
A. For what?
Q. For any reason.
Mr. Lydon: Your Honor, I will object to that. I don't see the relevance of that for any reason.
The Court: Sustained.
By Mr. Gilloghy: Q. All right, has your partner ever made you any loans?
Mr. Lydon: I will object to that.
The Court: Sustained.
By Mr. Gillogly: Q. Have you ever received any money or anything of value from Mr. O'Connell with the understanding that it came from Mr. Tinghino?
A. Absolutely not.
Q. Or with the suspicion that it came from Mr. Tinghino?
A. Absolutely not.
Q. Did Mr. Tinghino ever loan you money?
A. Not that I ever recall, no.
Q. Not even the price of lunch or something?
Mr. Lydon: I will object.
The Court: Sustained.
By Mr. Gillogly: Q. Has Mr. Tinghino ever loaned you or given you the use of anything of value, borrow a car?
A. Did I ever borrow Mr. Tinghino's car? Never.

Q. Well, did he ever let you have the use of anything?
A. I don't know what that means.
Q. Well, did he ever let you—
A. Use his fountain pen, his pencil?
Q. All right, did he ever let you rent a cabin or something like that?
A. Never."

The subject of bribery of police officers was renewed when Tinghino himself took the witness stand during the cross examination by Tucker (Tr. 1176):

"By Mr. Durkin: Q. Mr. Tinghino, you were summoned to testify before the Grand Jury, were you not?
A. Yes.
Q. And did you learn, when you were called to testify that the Grand Jury was looking into potential arson schemes and also involvement with the Chicago Police Department Bomb and Arson Squad in regards to bribery?
A. Yes.
Q. Now, you know Officers McInerney and O'Connell, right?
A. Yes.
Q. And you socialize with McInerney?
Mr. Lydon: I will object to that. I don't think there is any evidence of that.
The Court: Overruled.
By The Witness: A. Occasionally I have had lunch with him.
By Mr. Durkin: Q. He testified that you have had lunch with him.
A. Yes.
Q. And you are familiar with several members of the Bomb and Arson Squad, are you not, just from the nature of your work?
A. Yes."

The prosecutor apparently felt that even with no evidence he could make the following argument to the jury (Tr. 1389-90):

> "Ladies and gentlemen of the jury, you are entitled to make certain inferences from the evidence. We never saw any testimony that Anthony Tinghino paid off or did something with the Chicago Police Department to get them to cease their investigation of Spaces and Places. All we know is that Harry Widlan was told he was going to have to take a lie detector test and that Anthony Tinghino subsequently talked to the police officers. After that Harry Widlan did not take the lie detector test."

Tucker, the co-defendant, in his case put two witnesses on the stand. One testified that Tucher had been a top echelon confidential informant for the Federal Bureau of Investigation from 1964 through January, 1976 (Tr. 1190-1207); the other summarized the payments made by the Government to Tucker during that period of time (Tr. 1208-1211). Tucker himself never testified.

To rebut any implication that Tucker had been acting as an informant, the prosecutors then called ex-agent Vincent Inserra to the stand. In cross-examination Tucker's counsel once again spent considerable time asking about bribery of the Chicago Police Department Bomb and Arson Squad even though not a shred of evidence to support the slightest inference was introduced by anybody (Tr. 1295-96, 1302-03).

In final argument Tucker's counsel urged as he had in the opening statement and throughout the trial that his client had been indicted because as an informant he had not gathered enough evidence to charge members of the Bomb and Arson Squad with Tinghino (Tr. 1416-17, 1419).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW VIOLATES THE SPIRIT OF THIS COURT'S DECISION IN *BRUTON v. UNITED STATES*, 391 U.S. 123 (1968).

In *Bruton v. United States*, this Court recognized that there are instances where joint trials are such a threat to fair trials for the individual defendants that severance is required. Specifically, the Court held in *Bruton* that the risk was so great that the jury would not or could not follow limiting instructions with respect to evaluating a co-defendant's extra-judicial incriminating statements that a severance of defendants was required.

The Court noted that:

> Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed. *Pointer v. Texas, supra. Bruton v. United States, supra* at 136.

Similarly here, a jury was permitted to hear a co-defendant's counsel urge that his client was an informant gathering incriminating information on Tinghino without benefit of cautionary instructions and without opportunity for Tinghino to directly confront the accusation.

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON THE QUESTION OF SEVERANCE OF DEFENDANTS WHERE ONE DEFENDANT ASSERTS AN INFORMANT DEFENSE.

In *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973), a case remarkably similar to the instant one, the Court of Appeals for the Fifth Circuit held that the District Court should have granted Johnson's motion for a severance under Rule 14 of the Federal Rules of Criminal Procedure when it became evident that his theory of defense would be completely antagonistic to that of his co-defendant Smith. The two had been indicted together for passing counterfeit money. Johnson's defense was one of mistaken identity, that he was not present at the time of the offense, while Smith admitted that he passed the bills, but claimed that he was acting as an informant, and therefore lacked the requisite intent to defraud. A pre-trial motion for severance based on antagonistic defenses was denied.

> "Any doubt as to whether the potential prejudice to Johnson—which, we repeat, was forecast in his pre-trial motion—would come to fruition was dissipated at the trial.
>
> * * *
>
> In his opening remarks to the jury Smith's attorney characterized Smith as a 'white hat' government informer whose only purpose was to help lead law enforcement officers to the persons responsible for stealing and dealing in stolen unregistered firearms. Counsel described 'Butterball' Johnson as having a 'sack full of counterfeit money' and intimated that Smith, acting as his 'own Dick Tracy,' had a secondary goal of seeing that Johnson was apprehended for his activity with the counterfeit money. Counsel then commented on the transaction out of which the indictment arose and said that Johnson was present at the scene and was the one who had brought the bogus money to Smith. Smith's position was thus obvious: he was the good guy—only along for the ride—in order to see that criminals such as White and Johnson were removed from circulation." *United States v. Johnson, supra*, at 1132.

Thereafter Smith's attorney implicated Johnson at every turn. In that case, in contrast to the one at hand, at least Smith testified. Notwithstanding that fact, the Court reversed Johnson's conviction, holding that it was an abuse of discretion not to grant a severance, that "the prejudice to Johnson of defending at a joint trial . . . outweighed any possible disruption to the judicial process. . . ." *United States v. Johnson, supra*, at 1134.

In petitioner's case, the co-defendant Tucker's attorney not only implicated Tinghino with every opportunity in the crimes charged, but branded him as a briber of police officers and a counterfeiter.

THE DECISION BELOW SANCTIONS A SUBSTANTIAL DEPARTURE FROM ACCEPTED AND USUAL APPLICATION OF THE RULES OF EVIDENCE WHICH ABRIDGED THE DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL.

It has long been the rule of case law, recently codified in Federal Rules of Evidence 401 through 404, that evidence of misconduct unrelated to the charges of the indictment should not be presented before a jury because:

> "The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court." I Wigmore, Evidence Sec. 57 (Third Edition 1940).

The decision by the trial court to admit or not admit involves at least two considerations: (1) how relevant the evidence is, and (2) whether it is clear and convincing. *United States v. Ostrowsky*, 501 F.2d 318, 321 (7th Cir. 1974). However, weighing the substantiality of the evidence of the charge in the indictment, as considered by the Court of Appeals in this case below, constitutes a departure from accepted procedures in criminal trials and deprives a defendant of his constitutional right to a fair trial. As Judge Swygert noted in *United States v. Ostrowsky, supra*, at 324, "a fair trial is required for every defendant, regardless of his apparent guilt or the magnitude of the crimes he may have committed."

In this case, counterfeiting activities had no relevance to charges of arson and fraud, while bribery of police arson investigators was not established beyond wild speculation. Introduction of the extremely prejudicial matters before the jury deprived petitioner of due process and a fair trial.

CONCLUSION

For all the reasons aforestated, this Court should grant the petition for a writ of certiorari; to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

MATTHIAS A. LYDON
Suite 2120
120 South LaSalle Street
Chicago, Illinois 60603
(312) 236-7809

Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued September 19, 1978
November 13, 1978.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

Nos. 77-2050, 77-2300

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ANTHONY TINGHINO and BARRY M. TUCKER,
Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 77 Cr 201
THOMAS R. MCMILLEN, *Judge.*

ORDER

The defendants, Anthony Tinghino and Barry Tucker, were convicted in a jury trial on twelve counts of a fourteen count indictment which arose out of alleged arson activities. Specifically, they were convicted of conspiracy to devise a scheme to defraud through the use of arson in violation of 18 U.S.C. § 371, of mail fraud in furtherance of this scheme in violation of 18 U.S.C. § 1341, and of use of interstate facilities in furtherance of this scheme in violation of 18 U.S.C. § 1952. The scheme, in essence,

was that the defendants established businesses, obtained inflated invoices for ordered merchandise, secured insurance, and then arranged for a fire to destroy the premises. Insurance companies paid money in settlement of at least three claims that resulted from fires set pursuant to the scheme. Tinghino was the public fire insurance adjuster in each claim.

The primary issue Tinghino and Tucker raise on appeal is that they should not have been tried together and thus that the district court abused its discretion in refusing to grant a severance. It is quite clear that joinder of the defendants was proper under Rule 8(b), Fed. R. Crim. P., because the defendants were alleged to have participated in the same series of acts constituting the offenses. Rule 14, Fed. R. Crim. P., gives the trial court the discretion to grant a severance if it appears that a defendant is prejudiced by joinder. Both Tucker and Tinghino contend that the joinder prejudiced their respective defenses.

Tucker argues that he was prejudiced because the joinder prevented him from developing his defense that he was acting as a reliable Government informant. The record indicates that Tucker indeed was a Government informant from 1964 through 1976, but there is nothing in the record to indicate that his arson-related activity with Tinghino was performed pursuant to his activities as an informant. At trial, he was never prohibited from introducing such evidence. Moreover, he never even attempted to prove that the Government had requested that he inform on Tinghino's arson-related activities.

Tucker also argues that the joinder prejudiced him because he was precluded from showing a connection between Widlan and Tinghino in other criminal activity. This, however, did not prejudice Tucker, because any connection he may have been able to prove would not have established, or even buttressed, his defense.

Finally, in this regard, Tucker argues that he was prejudiced when Tinghino was allowed to testify as to a prior fire loss sustained by Tucker. Tinghino referred to this fire loss in the context of explaining the circumstances of his first encounter with Tucker. Any harm to Tucker that may have resulted from this reference was minimal, and certainly insufficient to sustain a finding that the trial court abused its discretion in not granting a severance. The defendant must make a strong showing of real prejudice. As this court stated in *United States* v. *Blue,* 440 F.2d 300, 302 (7th Cir. 1971), *cert. denied,* 404 U.S. 836, "[t]he moving party must show prejudice, that he will be unable to obtain a fair trial without severance, not merely that a separate trial will offer a better chance of acquittal."

Tinghino's arguments that he was prejudiced by the joinder are similarly ill-founded. Tinghino's basic defense theory was that he acted innocently and processed the fire losses in the usual and customary manner. He argues that Tucker's defense was antagonistic to this defense and thus prejudiced him. The degree of antagonism, however, is not, in our opinion, sufficient to conclude that the failure to sever deprived Tinghino of a fair trial. *See United States* v. *Kahn,* 381 F.2d 824, 839 (7th Cir. 1967), *cert. denied,* 389 U.S. 1015.

Tinghino contends that Tucker's attorney attempted to implicate Tinghino in other criminal activity not charged in the indictment. To the extent, if any, the record supports this contention, it does not reflect prejudice to Tinghino sufficient to have required severance. This case does not present a conflict in defense strategies so irreconcilable "that the jury will unjustifiably infer that this conflict *alone* demonstrates that both are guilty." *United States* v. *George,* 477 F.2d 508, 515 (7th Cir. 1973), *cert. denied,* 414 U.S. 827, *quoting United States* v. *Robinson,* 432 F.2d 1348, 1351 (D.C. Cir. 1970).

Furthermore, the Government presented substantial independent evidence against each defendant, and the trial court instructed the jury to consider the evidence as to each defendant separately in determining that defendant's guilt or innocence. This further assured a fair trial. *See United States* v. *Kahn,* 381 F.2d at 839.

Tinghino also argues that he was denied a fair trial because the Government's and his co-defendant's questioning of witnesses suggested without evidentiary foundation that he had bribed police arson investigators. This argument is unpersuasive because any suggestion that Tinghino may have bribed police officers did have evidentiary support. Tinghino makes similar arguments that the trial court abused its discretion by admitting certain evidence harmful to him. We have analyzed these claims and view them as frivolous.

Next, Tinghino contends that the trial court abused its discretion in denying his request for a bill of particulars. He sought the identity of persons who had investigated the arson incidents and received money. This court recently reaffirmed the well-established law in this area:

> The denial of a motion for a bill of particulars does not constitute an abuse of discretion "unless the deprivation of the information sought leads to the defendant's inability adequately to prepare his case, to avoid surprise at trial, or to avoid the later risk of double jeopardy.

United States v. *Roya,* 574 F.2d 386, 391 (7th Cir. 1978) (citations omitted). Tinghino did not adequately establish the necessity for the information he requested. Moreover, there is some indication that the trial court denied the request to protect the fact-finding process. Prior to trial, three Government witnesses had been threatened. Thus the trial court's decision to deny the defendant's motion for a bill of particulars was not an abuse of discretion.

Tinghino's last issue in this appeal, as he defines it, is whether the trial court erred in permitting the Government to impeach him on a totally collateral matter. At trial, Tinghino identified a sketch accurately portraying Tucker. An FBI agent then testified for the Government that he showed this sketch to Tinghino after the fires and that he denied ever having seen the man portrayed. Tinghino now argues that this testimony was elicited only for impeachment purposes and constituted impeachment on a collateral matter. We disagree. Although this testimony may have contributed to Tinghino's impeachment, it was admissible independently of any impeachment value because it provided circumstantial evidence of his consciousness of guilt. *See United States* v. *Incisco,* 292 F.2d 374, 380 (7th Cir. 1961), *cert. denied,* 368 U.S. 920.

The final issue we address in this case is Tucker's contention that the trial court's restriction of his cross-examination of three witnesses was improper and deprived him of a fair trial. We note in this regard that the trial judge has wide discretion in controlling the extent of cross-examination. *See Alford* v. *United States,* 282 U.S. 687 (1931). Contrary to Tucker's assertions, the trial judge did not abuse his discretion in limiting Tucker's cross-examination of Widlan. He permitted Tucker to inquire into and elicit from Widlan the circumstances of Widlan's agreement to testify for the Government. Widlan testified during cross-examination that he received immunity, that the United States Attorney's Office promised to write a letter to the Federal Parole Board to have his status reconsidered, and that after his cooperation was communicated to the federal judge in Ohio before whom he pleaded guilty, he was sentenced to five years for a counterfeiting conviction that carried a maximum possible sentence of twenty-five years. Moreover, during closing argument, Tucker's attorney discussed Widlan's motive for testifying and the court instructed the jury that the testimony of one who testifies under a grant of immunity should be viewed

with greater care than the testimony of an ordinary witness. Any additional cross-examination to show bias or motive would not have been significant; thus the trial judge did not abuse his discretion in restricting Tucker in this area. Indeed, he acted consistently with this court's recent pronouncement that a trial judge may restrict cross-examination to prevent the trial from being "converted into a trial of the witness on collateral matters rather than of the defendant on the charge in the indictment." *United States* v. *Hansen,* No. 77-1424, Slip Op. at 12 (7th Cir. Aug. 15, 1978).

Tucker also contests the trial judge's restriction of the cross-examination of Vasquez. We agree with the trial judge that this inquiry would have been irrelevant. A closer question is raised by the trial judge's restriction of Tucker's cross-examination of FBI agent Inserra. Inserra testified that during the time period in which the offenses occurred, June 1971 through March 1973, Tucker was never requested to provide, nor did he supply, any information to the Government concerning arson-related activities. Cross-examination was restricted to that time period. Then during a post-trial hearing, Inserra testified that Tucker had supplied arson-related information involving Tinghino. He supplied this information well after March 1973. Although, in retrospect, this testimony appears to have some minimal aspects of relevance, we cannot say that the trial judge's restriction to the relevant time period in the context of this trial constituted an abuse of discretion.

For the reasons stated herein, the judgment of the district court is

AFFIRMED.

No. 78-948

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANTHONY TINGHINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner and co-defendant Tucker were convicted of conspiracy to devise a scheme to defraud through the use of arson, and of mail fraud and use of interstate facilities in furtherance of this scheme, in violation of 18 U.S.C. 371, 1341, and 1952. Petitioner and his co-defendant were each sentenced to three years' imprisonment on the conspiracy count and placed on probation for three years on each of the remaining counts. The court of appeals affirmed (Pet. App. 1a-6a).

The evidence at trial, as the court of appeals stated (Pet. App. 2a), showed that petitioner and his co-defendant

> established businesses, obtained inflated invoices for ordered merchandise, secured insurance, and then

> arranged for a fire to destroy the premises. Insurance companies paid money in settlement of at least three claims that resulted from fires set pursuant to the scheme. [Petitioner] was the public fire insurance adjuster in each claim.

Petitioner contends (Pet. 17-19) that the district court's denial of his motion to sever his trial from Tucker's "violates the spirit" of *Bruton* v. *United States*, 391 U.S. 123 (1968), and conflicts with *United States* v. *Johnson*, 478 F. 2d 1129 (5th Cir. 1973), because the defenses of petitioner and Tucker were so inconsistent that petitioner was denied a fair trial (Pet. 8-9, 17-20).

The district court's denial of petitioner's severance motion does not conflict with *United States* v. *Johnson*, *supra*. In that case, a co-defendant (Smith) admitted committing the acts charged but claimed that he was merely a government informer and that defendant Johnson was present when the acts were committed (and had in fact arranged for their commission). Johnson's defense was that he was not present when the crimes were committed. The court of appeals found that Johnson's theory of defense was "completely antagonistic to that of his co-defendant Smith" and that the district court had been adequately apprised of this antagonism prior to trial. *United States* v. *Johnson*, *supra*, 478 F. 2d at 1131. The Fifth Circuit concluded that, in failing to grant Johnson's severance motion, the district court had abused its discretion.

That result is of no help to petitioner here. His defense was that he was merely doing his job as a fire adjuster (Pet. 8); Tucker's defense was that he, Tucker, was a government informant (S. Tr. 14-18). Afer reviewing the record in this case, the court of appeals concluded (Pet. App. 3a) that whatever inconsistencies existed between the two theories of defense did not deny petitioner a fair

trial. Although petitioner contends that the court of appeals should have concluded otherwise (Pet. 18-19), he does not take issue with the standard the court applied and there is no reason for this Court to review the court of appeals' fact-bound determination.[1]

Finally, petitioner contends (Pet. 19-20) that introduction of evidence that he had bribed police officers was improper. It is apparent, however, that petitioner's objection is not so much to the introduction of evidence[2] but to the questions of Tucker's counsel suggesting that petitioner may have been bribing policemen (see Pet. 10-16). The district court cautioned Tucker's counsel not to go any further into the matter (Tr. 219) but denied petitioner's motion for a severance or mistrial (*ibid.*). The district court also told petitioner's counsel that objections to questions would be considered waived unless made at the time the questions were asked (*ibid.*). These routine decisions of trial administration do not warrant this Court's attention.

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[1]Nor did the opening statement of Tucker's counsel violate *Bruton* v. *United States*, *supra*. Arguments of counsel are not evidence, as the jury was instructed (Tr. 1470); *Bruton*, therefore, has no application here. In any event, Tucker's counsel properly limited his opening statement (see S. Tr. 12-19) to what "I think the evidence is going to show you [i.e., the jury]" (S. Tr. 13, 14, 15, 16, 17, 18) and petitioner did not object to it.

[2]The only evidence that petitioner apparently finds objectionable is a statement by a participant in the arson scheme that he had told a grand jury "of criminal conduct other than the criminal conduct [he had] already testified to." See Pet. 10-11. This vague reference to other misconduct, if it is objectionable at all, did not warrant reversal of petitioner's conviction, as the court of appeals held (Pet. App. 4a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

DOJ-1979-03

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OCTOBER TERM, 1978

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Petitioner,

VS.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY OF PETITIONER

MATTHIAS A. LYDON
Suite 2120
120 South LaSalle Street
Chicago, Illinois 60603
(312) 236-7809

Counsel for Petitioner

Midwest Law Printing Co., Chicago 60601, FInancial 6 3988

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REPLY OF PETITIONER

The Solicitor General in the Memorandum for the United States in Opposition suggests at page 3 that petitioner waived his objections to presentment of irrelevant and prejudicial matters before the jury.

The Court should note that immediately after and because of the opening statement of Tucker's counsel, prior to introduction of any evidence, petitioner moved for a mistrial and severance (Tr. 9).

Similarly, timely objections were made elsewhere, and it should be noted that the Solicitor has not pointed out any specific instances of waiver. Petitioner does recall that the whole question of unconfronted innuendo was exacerbated by a paragraph in the indictment which charged petitioner with distributing money to persons responsible for investigation of certain of the fires set forth in the indictment (Rec. 1, par. 12). Denial of a request for a bill of particulars identifying the persons to whom money was distributed (Rec. 12, par. 20) contributed to the confusion. Until the evidence was closed, it would not be known that the government would present no evidence on police bribery. Even if, therefore, specific instances of failure to object could be found, in the context of confusion over the charges, there could be no waiver.

Respectfully submitted,

MATTHIAS A. LYDON
Suite 2120
120 South LaSalle Street
Chicago, Illinois 60603
(312) 236-7809

Counsel for Petitioner